

1992

# Steven C. Davis v. Karl N. Weenig, John P. Porter : Brief of Appellant

Utah Court of Appeals

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Richard C. Coxson; Attorney for Appellant.

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IN THE UTAH COURT OF APPEALS  
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STEVEN C. DAVIS :

Plaintiff-Appellant :

vs. :

Case No.  
920654-CA

KARL N. WEENIG and JOHN P. :  
PORTER, :

Defendants-Respondents.: :

*Priority 15*

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BRIEF OF APPELLANT  
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APPEAL FROM THE JUDGMENT OF THE FOURTH  
DISTRICT COURT, UTAH COUNTY, STATE OF  
UTAH, THE HONORABLE BOYD PARK, JUDGE, PRESIDING  
-----

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IN THE UTAH COURT OF APPEALS  
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STEVEN C. DAVIS :  
Plaintiff-Appellant :  
vs. : Case No.  
: 920654-CA  
KARL N. WEENIG and JOHN P. :  
PORTER, :  
Defendants-Respondents.

- - - - -  
I. JURISDICTION

This is an appeal from a dismissal by the Fourth District Court, Utah County, State of Utah of Appellant's action. The Supreme Court has jurisdiction pursuant to Utah Code Annotated Section 78-2-2. The Court of Appeals has jurisdiction because this case was poured over from the Supreme Court pursuant to Utah Code Annotated 78-2a-3(2)(j) by letter dated October 16, 1992.

II. STATEMENT OF THE ISSUES

a. Whether the evidence presented at trial supports the jury's finding of no proximate cause.

This Court will not upset a jury verdict unless there is a showing that the evidence so clearly preponderates against the prevailing party that reasonable people would not differ on the outcome of the case. Smith v. Vuicich, 699 P.2d 763, 764 (Utah 1985).

b. Whether the law supports the jury's finding of no proximate cause.

A trial court's statements or conclusions of law are accorded not particular deference; we review them for correctness. Doelle v. Bradley, 784 P.2d 1176, 1179 (Utah 1989).

c. Whether the court erred in denying plaintiff's Motion for new trial.

In reviewing denial of motions for a directed verdict, judgment n.o.v., or in the alternative for a new trial, this court must view the evidence in the light most favorable to the party against whom the motion was made. McCloud v. Baum, 569 P.2d 1125, 1126-1127 (Utah 1977).

### III. DETERMINATIVE PROVISIONS

a. Utah Rules of Procedure 59(a):

Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse part, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury, and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.

(3) Accident or surprise, which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.

- (6) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law.
- (7) Error in law.

#### IV. STATEMENT OF THE CASE

##### A. Nature of the Case

This action was brought by plaintiff to recover for injuries suffered in an automobile accident which occurred on or about May 25, 1988 and heard before a jury on April 27-30, 1992. The jury found defendants one hundred percent (100%) negligent, but with no proximate cause of plaintiff's injuries.

##### B. Proceedings and Disposition

A Complaint was filed herein July 12, 1990. R at 4. Defendants answered and requested a jury trial. R at 7, 17. A jury trial was held April 27-30, 1992 before the Honorable Boyd L. Park in the Fourth Judicial District Court in and for the County of Utah, State of Utah. R at 354. The Defendants were found negligent, but that there was no proximate cause between plaintiff's injuries and defendants' negligence was found by the jury. R at 337. Motion for New Trial was filed. R at 290. Order denying new trial was entered July 13, 1992. R at 340. Notice of Appeal was filed August 5, 1992.

##### C. Statement of Facts

1. On May 25, 1988, plaintiff was driving southbound on University Avenue at approximately 4000 North when he stopped for a red light. R at 354, p. 93.

2. Vehicles driven by defendants Karl N. Weenig and John P. Porter struck the rear of plaintiff's vehicle. R at 354, p. 95.

3. Defendants negligently operated their vehicles. R at 337. The undisputed facts disclose the following injuries which resulted from the accident:

a. Plaintiff's knee injuries were aggravated by the accident. R at 354, pp. 415, 488, 498;

b. Plaintiff suffered a subluxation of the joints along his back. R at 354, pp. 346-347;

c. Plaintiff suffered several back injuries prior to 1984 which were resolved by treatment prior to 1984. R at 354, p. 373;

d. Plaintiff was last seen for a back treatment prior to the injury in 1986. R at 354, pg 529;

e. The only expert which performed the objective AMA Guideline whole body rating found a twenty percent (20%) whole body disability. R at 354, p. 513;

f. The car accident aggravated plaintiff's preexisting Post Traumatic Stress Syndrome. R at 354, p. 599;

g. The accident aggravated Plaintiff's preexisting Post Concussional Syndrome by between ten (10%) and forty percent (40%). R at 354 p. 617;

h. Plaintiff's whole body impairment to include the mental stress and physical aggravation of the Post Concussional



Syndrome was twenty to twenty-one percent (20-21%) without the knees being included. R at 354, p. 711;

i. Defendants' sole medical expert opinion regarding back and neck was expressed without having conducted any physical or records examination upon which to base an opinion. R at 354, p. 492.

4. The court allowed reference to highly prejudicial proceedings in this case. R at 354, p. 31.

5. The jury found defendants one hundred percent (100%) negligent. R at 336-337.

6. The jury found that defendants were not the proximate cause of plaintiff's injuries. R at 337.

#### SUMMARY OF THE ARGUMENT

This action was brought about by the negligent conduct of defendants in the operation of their motor vehicles. The jury found that they had in fact been negligent in hitting plaintiff. Plaintiff was found not to have been negligent at all. The only credible evidence presented showed that plaintiff was injured as a result of the accident.

In spite of this, the jury found that plaintiff's injuries were not the result of the actions of the defendants. Because the undisputed competent evidence shows that plaintiff was injured as a result of the accident, the jury verdict should be reversed and a new trial ordered on proximate cause and damages.

## ARGUMENT

### I. STANDARD OF REVIEW

This action arises out of an automobile accident which occurred May 25, 1988. R at 354, p. 93. Defendants both slammed into the back of plaintiff's vehicle while travelling southbound on University Avenue at approximately 4000 North. R at id. The jury found the defendants to have been negligent in their actions. R at 337.

On appeal, plaintiff has raised three (3) issues:

1. Whether the evidence is insufficient to support the jury verdict;
2. Whether, as a matter of law, the jury verdict is not supported by the evidence; and
3. Whether the trial court improperly denied the Motion for New Trial.

In reviewing a jury verdict, great deference is given to that verdict. In Smith vs. Vuicich, 699 P.2d 763 (Utah 1985), the court held that:

This court will not upset a jury verdict unless there is a showing that the evidence so clearly preponderates against the prevailing party that reasonable people would not differ on the outcome of the case. Smith, 699 P.2d at 764.

On appeal, therefore, plaintiff must marshal the evidence in support of the jury verdict and then demonstrate that such evidence is insufficient to support the verdict. Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989).

In raising the issue as to whether, as a matter of law, the jury verdict was contrary to the evidence, see Doelle vs. Bradley, 784 P.2d 1176, 1179 (Utah 1989).

Plaintiff also brought a Motion for New Trial under Rule 59(a)(6) of the Utah Rules of Civil Procedure which provides in material part as follows:

Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties on all or part of the issues, for any of the following causes:...(6) insufficiency of the evidence to justify the verdict or other decision, or that it is against law. R at 290

The trial court denied the Motion for New Trial. (R at 340) In McCloud vs. Baum, 569 P.2d 1125 (Utah 1977), the court held that:

In reviewing denial of motions for a directed verdict, judgment n.o.v., in the alternative for a new trial, this court must view the evidence in the light most favorable to the party against whom the motion was made. In reviewing a trial court's exercise of discretion upon a motion for a new trial, this court, examines the record to determine whether the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust. If there be an evidentiary basis for the jury's decision, then the denial of the new trial must be affirmed. McCloud, 569 P.2d at 1126-1127.

Based upon the foregoing, plaintiff will marshal the evidence and show that the evidence was so lacking or so slight and unconvincing in favor of the denial of proximate cause by the jury, that the verdict was plainly unreasonable and unjust.

## II. The Undisputed Evidence Showed Causation of Injury

Defendants called only one (1) medical expert. He performed no examination on plaintiff's back or neck. R at 354 p. 492. Neither

did he perform an examination with regard to the claimed psychological injuries. R at 354, p. 484. He did examine the knee, and testified that the accident aggravated the knee injury of plaintiff to the amount of five to fifteen percent (5-15%). R at 354, pp. 488, 498.

The undisputed evidence showed that plaintiff did not have ongoing back problems, but that his back was last adjusted prior to the accident in 1986 and not for an injury complaint. R at 354, p. 529. Prior to that, he was seen in 1984, and all his back problems to that time had been resolved. R at 354, p. 373. The undisputed evidence shows that plaintiff had an approximate twenty percent (20%) whole body permanent rating based upon the objective AMA Guidelines. R at 354, pp. 513, 711.

The physical impairment rating was performed pursuant to the AMA Guidelines with an inclinometer to test various ranges of motion. R at 354, p. 506. The psychological impairment rating was determined by a qualified expert with numerous years of experience. R at 354, pp. 701-703.


Defendants' expert agreed that aggravation of the knee injury had occurred due to the accident. R at 354, p. 492. No evidence was offered that at least some of plaintiff's back, neck and psychological injuries were not a result of the accident. The jury's verdict was therefore purely speculative, and not based upon the evidence as presented wherein it denied proximate cause of plaintiff's twenty percent (20%)

permanent partially impairment. The jury's verdict is therefore based on insufficient evidence and no reasonable person could have reached this decision based upon the evidence as presented.

CONCLUSION

The jury's verdict will be upheld unless, based upon the marshalled evidence there is insufficient evidence to support that verdict. The undisputed evidence shows that plaintiff was injured as a result of the negligence of defendants. The denial of Motion for New Trial should be reversed at this case remanded for proceedings consisted herewith.

DATED this 28 day of December, 1992.

  
\_\_\_\_\_  
RICHARD C. COXSON  
Attorney for Plaintiff-Appellant


MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid to:

Brett G. Pearce  
Attorney for Defendant Weenig  
RICHARD K. SPRATLEY & ASSOCIATES  
1018-B Atherton Plaza, Suite B202  
Salt Lake City, UT 84123

William J. Hansen  
Attorney for Defendant Porter  
CHRISTENSEN, JENSEN & POWELL  
175 South West Temple, #510  
Salt Lake City, UT 84101

DATED this 28 day of December, 1992.

  
\_\_\_\_\_  
RICHARD C. COXSON  
Attorney for Plaintiff-Appellant

**FILED**

JAN 19 1993

**COURT OF APPEALS**

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IN THE UTAH COURT OF APPEALS  
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STEVEN C. DAVIS	:	ADDENDUM
Plaintiff-Appellant	:	
vs.	:	Case No.
		920654-CA
KARL N. WEENIG and JOHN P.	:	
PORTER,	:	
	:	Priority 15
Defendants-Respondents.:	:	

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BRIEF OF APPELLANT  
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SPECIAL VERDICT

We, the jury in the above-entitled action find from a preponderance of evidence the answers to the interrogatories or questions propounded to us as follows:

1. Considering all of the evidence in this case, do you find that the defendant Karl Weenig was negligent in performing any one or more of the specific acts of negligence alleged by the plaintiff.

ANSWER: Yes   X   No       

2. Considering all of the evidence in this case, do you find that the negligence of the defendant Karl Weenig was a proximate cause of the injuries of plaintiff.

ANSWER: Yes        No   X  

3. Considering all of the evidence in this case, do you find that the defendant John P. Porter was negligent in performing any one or more of the specific acts of negligence alleged by the plaintiff.

ANSWER: Yes   X   No       

4. Considering all of the evidence in this case, do you find that the negligence of the defendant John P. Porter was a proximate cause of the injuries of plaintiff.

ANSWER: Yes        No   X  

5. Considering all of the evidence in this case, do you

find that the negligence of the plaintiff Steven C. Davis was a proximate cause of plaintiff's injuries?

ANSWER: Yes \_\_\_\_\_ No X

6. Considering all of the evidence in this case, do you find that the negligence of the plaintiff Steven C. Davis was a proximate cause of plaintiff's injuries?

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

7. If you have answered any or all of the Questions 2, 4, and 6 "Yes," then, and only then, answer the following question: Assuming the combined negligence of all parties to total 100%, what percentage of that negligence is attributable to:

A.	Defendant Karl Weenig	_____ %
B.	Defendant John P. Porter	_____ %
C.	Plaintiff Steven C. Davis	_____ %
TOTAL		100%

8. If you have answered either or both Questions 2 and 4 "Yes," state the amount of special and general damages, if any, sustained by the plaintiff. If neither questions were answered "Yes," do not answer this question.

Special Damages:	\$ _____
General Damages:	\$ _____
TOTAL	\$ _____

WHEREFORE, upon motion of the defendants, and good cause



appearing, it is hereby ORDERED, ADJUDGED AND DECREED, that the defendants have judgment against the plaintiff on his complaint of no cause of action and the defendants are awarded their costs of court in the sum of \$2,386.30, as is reflected by the Memorandum of Costs and Disbursements which has been filed with the Court.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1992.

*July 6, 1992*  
*Signed*

BY THE COURT:

*/s/*

BOYD L. PARK, District Judge

1 damages , we show you even filed a lawsuit seeking  
2 compensation for psychological damages. Their expert  
3 comes in and says that they are different. We are happy  
4 to have them come in and say it that they are different.

5 MR. FISHER: What I am saying, Your Honor, I think  
6 they have a right to ask the question. This exhibit is not  
7 relevant and it goes too far and it becomes prejudicial.  
8 This document is not relevant. They can ask the question  
9 have you filed a lawsuit in which you claim  
10 psychological damages and he can say , "Yes". Then the  
11 experts are going to testify and show the difference.

12 MR. HANSEN: Excise the part that isn't relevant.

13 MR. FISHER: We have explained that on many many  
14 occasions. You know it is obviously what is trying  
15 to be here and it is to confuse the jury. The jury is  
16 going to be extremely confused by that.

17 THE COURT: The document itself may be too prejudicial  
18 and may not allow that in. Again this is going to be  
19 hard to tell until we get into the course of the trial.  
20 The document, itself, certainly they have a right to  
21 inquire into that. If their answers come back in such a  
22 fashion that it appears to be a denial or something of that  
23 nature then I may allow the document in.

24 MR. HANSEN: Your Honor, if we may. What we would  
25 propose to do is we can make reference to the document as I

1 day in January of 1986. They had brought this gentleman  
2 up from Las Vegas. Before I went in there for arraignment.  
3 he came in and collaborated the whole story that we had  
4 set forth . At that time, they dismissed all charges.

5 Q Now I want to direct your attention to May 25, 1988  
6 some three years later is that correct?

7 A Yes.

8 Q Do you recall what happened that day about 8:00 o'clock  
9 in the morning?

10 A I was in route from , I had come down 8th North  
11 in Orem down to the mouth of Provo Canyon and turned onto  
12 the old University Avenue coming towards Provo. I was  
13 approaching the light that was up there north in the river  
14 bottoms. There were several cars in front of me. I was  
15 in my pickup truck and approaching a stoplight. My one  
16 foot was in the clutch and my one foot was on the brake  
17 when I was struck two times.

18 Q Did you actually own that truck?

19 A No.

20 Q What is the make and model of that truck?

21 A It is a Toyota Pickup Truck that had like a camper  
22 shell in the back of it. It is a regular simple Toyota  
23 pickup truck about a 1987.

24 Q Who is the owner of that pickup?

25 A My father.

1 drawn as your vehicle?

2 A (witness doing as requested)

3 Q As you approached the light what happened?

4 A The light had turned red and I was either totally  
5 stopped or in the process of being stopped with the  
6 vehicles in front of me being stopped too. At which  
7 time, with my foot on the brake and foot on the clutch as  
8 the car came and slammed into me and jarred me forward, at  
9 which time I instinctly pushed very hard on my both pedals  
10 to prevent going forward or just instinctively I guess.  
11 You are already on there. It hit me in the back right with  
12 and it was a good hit. I guess I was just in the act  
13 of turning to see what had been, what had hit me , at which  
14 time in this twisted foremat, I got impaced on this side  
15 of the truck. My body basically, my legs flew off from the  
16 came off from the brake and the clutch . My part of  
17 my body was twisting back this other way . My neck came  
18 forward several times and whip lash from that.

19 Q You can go back up there and sit down if you would.

20 A (witness doing as requested)

21 Q What caused you to stop on that date?

22 A Just- -

23 Q Just before the accident what caused you to stop?

24 A There was a redlight ahead of me.

25 Q Did you have to stop suddenly?

1 in my office I use which is reactive muscle testing.  
2 It is kind of a body language where the body gives us  
3 information. In my test it indicated that when he leaned  
4 forward to the right direction there was stress on his body.  
5 I was trying to compensate that by my adjustments.

6 Q Now after you made your findings, did you make  
7 a working diagnosis for Steve?

8 A I also did palpation for palpatory tenderness.

9 Q What is that?

10 A Well, doing ranges, palpating the tissue to see  
11 if there is swelling. If there has been trauma there and the  
12 muscles are taught and in spasm and they were in the cervical  
13 and upper thoracic and lumbar region. Those were basically  
14 the tests that I performed on that date.

15 Q After performing those tests in getting your  
16 findings did you make a working diagnosis?

17 A I did.

18 Q What was that diagnosis?

19 A Just a moment and I will read it to you.

20 Q Okay.

21 A I indicated that he had a sprain strain to the cervical  
22 region, suffering from headaches. He had muscle swelling.  
23 He had neuralgia. He had disk injury of the cervical  
24 region. He had neuralgia which is numbness and tingling  
25 in his upper extremities. He had pain in the neck and

1 the thoracic spine. He had intercostal neuralgia which  
2 is pain and some numbness tingling between the rib cage between  
3 the ribs.

4 My diagnosis to communicate with insurance companies we  
5 have to use codes and they are generic and very limited.  
6 To demonstrate a subluxation as chiropractors we work  
7 with spine and reduce subluxation which are less  
8 then a dislocation. Dislocation is the complete  
9 integrity of the joint is gone. Subluxation is less then  
10 that. I note on one of my codes in my report my secretary  
11 typed it up has a dislocation of the lumbar spine . With  
12 the code that we have to use to report this it comes out  
13 dislocation but in actuality it is a subluxation. It is  
14 not a complete dislocation.

15 Also my diagnosis indicated there is injury to the  
16 knee and the legs.

17 Q I notice that you have down there diagnosis of  
18 Brachial neuritis?

19 A The Brachial Plexus is here the lower cervical  
20 and thoracic region and the nerves that they exit the spinal  
21 column if they are irritated we through our test findings  
22 if they are positive they indicate that neuritis neuralgia,  
23 irritation of the nerve tissue.

24 Q So it is irritation of the nerve tissue itself?

25 A Yes.

1           A   I don't know. I will have to look it up. He was  
2 treated at the Murray Park Chiropractic Office on 5/26/78  
3 mainly a sprain of the lumbar spine in the lower back.

4           Q   In order to short circuit all of this, Your Honor.  
5 Let me ask you what was the last time that you treated  
6 Mr. Davis prior to May 26, 1988?

7           A   The last time I treated him according to my records  
8 to my knowledge was April 6, 1984.

9           Q   Okay have you formed an opinion as to whether  
10 or not any of the injuries that you treated Mr. Davis  
11 for prior to April 6, 1984 had been resolved?

12          A   Yes.

13          Q   And what was your opinion?

14          A   It was my opinion they were temporary and they were  
15 resolved and he had no further care. He was doing fine.

16          Q   As I understand your testimony to be then that since  
17 April 6, 1984 until May 26, 1988 approximately four years  
18 you had not treated Mr. Davis is that correct?

19          A   I did not no.

20          Q   Showing you what has been marked as Exhibit No. 39  
21 (indicating) can you identify that please?

22          A   This is what I prepared in preparation for a deposition  
23 as to treatments prior to his auto accident at my office  
24 according to my records.

25          Q   And it just indicates how many times he saw you and

1 conservative treatment measures to help him deal with  
2 his problem.

3 Q Now the surgery was performed on the right knee  
4 is that correct?

5 A Yes.

6 Q Would you identify Exhibit No. 53 (indicating)  
7 please?

8 A This is a letter addressed to Dr. David Beck in response  
9 to his inquiries regarding Mr. Davis.

10 Q And does that contain your diagnosis of Mr. Davis'  
11 problem?

12 A It contains a brief synopsis.

13 Q Now Dr. Rosenberg have you an opinion as to  
14 whether or not any of the injuries for which you  
15 treated Mr. Davis was caused by the automobile accident  
16 or aggravated by the automobile accident?

17 A Yes.

18 Q And what is that opinion?

19 A My opinion is that the ligament insufficiency, the  
20 cartilage tears pre-dated the accident.

21 Q Was any of the damage or any of the injuries that you  
22 observed in treating or examining Mr. Davis caused by the  
23 accident in your opinion?

24 A It is my opinion that the accident may have aggravated  
25 the cartilage injury that was already present in Mr. Davis'



1 Q Would it surprise you that Dr. Rosenberg  
2 found that or placed a percentage on the problems  
3 with Mr. Davis' knees aggravation at 20 percent?

4 A I would disagree with that.

5 Q In fact you would disagree that there would be  
6 any type of long term aggravation caused to Mr. Davis'  
7 knees is that correct?

8 A Well I think that I clarified that in our deposition.  
9 I stated categorically that at most there would be 10 to  
10 15 per cent. In thinking of that I just feel that even that  
11 was probably more generous than reality.

12 Q We would ask that Dr. Rosenberg's notes, deposition  
13 be published, or Dr. Smith's deposition be published?

14 THE COURT: Do you have any objections?

15 MR. HANSEN: None.

16 MR. PEARCE: No.

17 THE COURT: Dr. Smith's deposition will be  
18 published.

19 BY MR. FISHER:

20 Q Dr. Smith I am going to read the question and I  
21 would like you to read the answer.

22 A Okay.

23 Q When you say aggravation can you tell from here  
24 how much of that may have been caused by the aggravation from  
25 the accident would you read your answer please?

1 Rosenberg's findings to be that there was no swelling in the  
2 knees?

3 A No that isn't what I said. I said that they were  
4 consistent with the instability that was present.

5 Q I also understand your testimony that you did no  
6 orthopedic or neurological tests on Mr. Davis'  
7 back or neck is that correct?

8 A That is correct.

9 Q So the opinions that you expressed is without the  
10 opportunity to examine or to perform those tests on Mr.  
11 Davis is that correct?

12 A That is correct.

13 Q Also when you were referring to the neuritis,  
14 excuse me the radiculitis the answer, your response  
15 to this would be based upon your seeing Mr. Davis three years  
16 after the accident is that correct?

17 A That is correct.

18 Q Now I understand that you did some range of  
19 motion tests on Mr. Davis' knees?

20 A I think we discussed that in the deposition.

21 Q Wasn't it in your testimony just a few minutes ago  
22 that you did range of motion tests?

23 A I did.

24 Q Did you use the inclinometer to measure?

25 A No I did not.

1 MR. HANSEN: Let's just start and read that whole  
2 answer again.

3 THE WITNESS: In answering your question let us assume  
4 that Dr. Burton's diagnosis was correct that it was a strain.  
5 That strain should have healed reasonably well in about two  
6 months or that would have put him back to pre-injury status.  
7 Now since we didn't have that two months, we don't know  
8 whether that is true or not. Just statistically I am  
9 saying that the probabilities are that from two or even at  
10 the longest three months with a strain in a close to normal  
11 knee. Now when you go to this man's knee which already has  
12 the complex tears in it. If he began to have let's say he was  
13 asymptomatic a full month before. He limited his activities  
14 and in that particular period of time he started to have  
15 symptoms post-accident and that heightened his desire  
16 to go ahead and have it looked at and treated it  
17 surgically. In that you can say that is an aggravation.

18 Q The question I probably had you read more than  
19 you needed to there. At the time of your deposition  
20 did you render an opinion as to the length of time that  
21 aggravation would, or excuse me the duration of that  
22 aggravation?

23 MR. FISHER: I want to make sure that I am understanding.  
24 You are asking him that at the time you gave this answer?

25 MR. HANSEN: I am asking him if his testimony then

1       Then there is a rotational component which is also  
2 measured . It is measured in kind of an awkward position  
3 but yet it is how much rotation, the shoulders rotate  
4 on the hips. That was measured at 20 degrees in both  
5 sides also for another 1 per cent impairment.

6       Q Okay, and did you what was the total of the thoracic range  
7 of motion?

8       A The thoracic range of motion would be 4 per cent  
9 then.

10       Q Is that to be added to your total body impairment  
11 that you did?

12       A That would be combined using the chart.

13       Q All right have you done that or could you do that  
14 right now?

15       A I can do that just taking the spine without the  
16 knees, 17 plus the 4 would be 20 per cent.

17       Q And with the knee?

18       A With the knee 20 plus the 5 would be 24 per cent.

19       Q Your Honor we would move for the admission of  
20 Exhibit No. 59 and 60?

21       THE COURT: You have already done that. We have  
22 already received them.

23 BY MR. FISHER:

24       Q Just so we have a little background, you mentioned  
25 a 100 per cent then someone would be dead, when is a person

1 that the problems that he was experiencing were from the  
2 accident he had.

3 Q Now you stated that you hadn't seen him since  
4 1986?

5 A Right.

6 Q Were you able to determine whether or not the  
7 complaints that Mr. Davis Had when he came to see you after  
8 the accident were involved injuries that were different to the  
9 injuries you treated him for prior to 1986?

10 A Well, in 1986 he came in for a low back adjustment.  
11 I just saw him that one time during the year. It was not  
12 as significant or severe as what I had been treating him  
13 the last four years.

14 Q You have an opinion as to whether or not  
15 the complaints or the problems that Mr. or the injuries  
16 excuse me that Mr. Davis saw you for prior to May of 1988  
17 were the same injuries that he saw you for after May of  
18 1988?

19 A Absolutely not no.

20 Q You don't have an opinion or they were not the same?

21 A Well they were not the same particular problems.  
22 He was showing a few other problems. He was complaining of  
23 some tingling down the legs, numbness which was more severe  
24 then when he came. He just came in for a back adjustment  
25 in 1986.

1 about initially during those months of intense emotional  
2 trauma experienced by Mr. Davis during the time when there  
3 was a threat to the adoption stability of the adoption  
4 of one of his children. The nature of post traumatic  
5 stress disorder however, is such that once you have  
6 experienced a traumatic event, another traumatic event  
7 occurring in the future exacerbates it. It causes a  
8 resurgence of those old post traumatic stress symptoms.  
9 Yes I have in answer to your question, yes I believe that the  
10 post traumatic stress disorder came about from that  
11 significant trauma through the adoption process. I believe  
12 that it was exacerbated significantly by the accident itself.

13 Q Has there been other stresses in Mr. Davis'  
14 life that you are aware of that would have added stress  
15 to the post traumatic stress syndrome?

16 A Yes there certainly have.

17 Q And what are they?

18 A In addition to his problem with the adoption, this  
19 secondary problem with the automobile accident, Mr. Davis  
20 was, I believe confronted once he came to me and talked  
21 about a confrontation between himself and the FBI with  
22 them investigating something. There was a confrontation  
23 I believe , and I seem to recall, between him and the  
24 Security and Exchange Commission. Then down the road there  
25 was another extremely traumatic event when his home was to be

1 you look ahead to a case of this kind, we are looking at  
2 maybe five years medication here and that will cost  
3 a little over \$6,040.00.

4 Travel for treatment - -

5 Q Maybe we perhaps could short cut this a little bit.  
6 do you have a total?

7 A Yes I do.

8 Q What is that?

9 A \$26,140.00.

10 Q Now that is for all of his treatment is that correct?

11 A That is for all treatment.

12 Q What per cent of that would you determine to be as a  
13 result of the accident?

14 A I would relate 10 to 40 per cent a range there  
15 because Mr. Davis is a very complex case somewhere between  
16 10 and 40 percent of that figure.

17 Q Thank you. That is all I have.

18 THE COURT: Mr. Pearce, you may Cross Examine.

19

20 CROSS EXAMINATION

21 BY MR. PEARCE:

22 Q I believe you have stated Dr. Ghant that you first  
23 saw Mr. Davis in August of 1990 is that correct?

24 A I believe that was the date that I first saw him.

25 Q Now at that time, did you take what is equivalent of

1           A   Right in a lay sense of it right.

2           Q   Did you also determine a psychological impairment for  
3   Mr. Davis?

4           A   In what sense do you mean psychological impairment?

5           Q   Rating?

6           A   A rating. I was asked in the deposition to give  
7   a rating and that is the only one I did.

8           Q   And what was that?

9           A   About 7 per cent.

10          Q   Explain the difference why you have 10 per cent  
11   of the total emotional distress and 7 per cent rating?

12          A   Well, as we would think of it, most of us would  
13   think of it as a 100 per cent means that you were totally  
14   disabled to do anything. In a medical sense if you are  
15   50 per cent disabled you are very close to unemployable,  
16   probably can't do very much. So that the category specified  
17   by the, you know the set of definitions, the impairments  
18   are rated in terms of severity, usually in groups fairly  
19   gross groups like 5 or 6 different groups, mild and like  
20   none, mild, moderate, moderately severe and very severe  
21   type groups. Then you as a clinician have to either  
22   follow the guideline if there is a specific guideline if  
23   they give you or you have to do your best guess. You know  
24   here is an objective impression of what that impairment is.

25          Q   Okay, now does that 7 per cent is that the same as